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No. 80-6519

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

MAJOR HENRY JOHNSON, JR., PETITIONER

v.

COMMONWEALTH OF VIRGINIA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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April 15, 1981

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QUESTIONS PRESENTED

FOR REVIEW

1. Whether the Virginia Supreme Court improperly construed United States v. Scott, in holding that a jury's directed verdict of "not guilty" was not an "acquittal" for double jeopardy purposes?

2. Whether this Court should settle a considerable conflict among the Courts of Appeal and state courts of last resort, and hold that the fifth and fourteenth amendments to the Constitution require that a criminal defendant's confession be excluded from evidence when, prior to making the confession, he requested an attorney and thereafter, before he had the opportunity to confer with his attorney, the police initiated a new custodial interrogation session and obtained an inculpatory statement?

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1980

MAJOR HENRY JOHNSON, JR., Petitioner

v.

COMMONWEALTH OF VIRGINIA, Respondent

The petitioner, Major Henry Johnson, Jr., respectfully prays that a writ of certiorari issue to review the judgments and opinions of the Supreme Court of Virginia entered in this criminal proceeding on January 16, 1981 and June 8, 1979.

OPINIONS BELOW

Two opinions of the Virginia Supreme Court are involved in this petition, as that court, upon first appeal, remanded this criminal case to the trial court for further proceedings. The first opinion, dated June 8, 1979, and set out in the appendix hereto, is reported at 220 Va. 146, 255 S.E. 2d 525 (1979). The second opinion, also set out in the appendix, not yet officially reported, is reported at 273 S.E. 2d 784 (1981).

JURISDICTION

The final opinion of the Virginia Supreme Court was issued on January 16, 1981. Counsel for petitioner then mistakenly believed that former Rule 22 of this Court governed the time for filing this petition. On April 11, 1981, counsel became aware of the changed time requirements of present Rule 20.1, and submitted an application for extension of time to file, which applicaton was not timely made under Rule 29.2, and which the Clerk therefore properly declined to accept. This petition for writ

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of certiorari is filed within 90 days of the final judgment of the Virginia Supreme Court, the time prescribed by the former rules. This Court's jurisdiction is invoked under 28 U.S.C. §1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States, Amendment XIV, §1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Code of Virginia (1950), §18.2-31:

Capital murder defined; punishment.--The following offenses shall constitute capital murder, punishable as a Class 1 felony:

(a) The willful, deliberate and premeditated killing of any person in the commission of abduction, as defined in §18.2-48, when such abduction was committed with the intent to

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extort money, or a pecuniary benefit;

(b) The willful, deliberate and premeditated killing of any person by another for hire;

(c) The willful, deliberate and premeditated killing of any person by an inmate in a penal institution as defined in §53-19.18, or while in the custody of an employee thereof;

(d) The willful, deliberate and premeditated killing of any person in the commission of robbery while armed with a deadly weapon;

(e) The willful, deliberate and premeditated killing of a person during the commission of, or subsequent to, rape; and

(f) The willful, deliberate and premeditated killing of a law-enforcement officer as defined in §9-108 when such killing is for the purpose of interfering with the performance of his official duties.

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STATEMENT OF THE CASE

On December 12, 1977, the petitioner, Major H. Johnson, Jr., was arrested by Virginia authorities and charged with robbery, with premeditated murder in the commission of armed robbery while armed with a deadly weapon ("capital murder" under Virginia Code §18.2-31(d)), and with use of a firearm in the commission of murder.

The following day, the petitioner appeared in state court in Roanoke, Virginia, was arraigned, and affirmatively requested the appointment of an attorney. An attorney was thereupon appointed. That afternoon, a local police detective, James C. Clingenpeel, who testified he neither knew nor cared whether counsel had been appointed for the petitioner, visited him in jail and initiated an interrogation session. At this point, the petitioner had not yet had the opportunity to confer with counsel.

The detective read the petitioner his "Miranda rights" from a printed card, obtained the defendant's signature on a "waiver form," and proceeded to take an oral inculpatory statement from him. The officer thereafter made a memorandum of this statement, which was never examined or signed by the petitioner. App., pp. 9-10. On March 28, 1978, petitioner filed a written motion to suppress this statement, based upon federal constitutional grounds. The trial court held a hearing on this motion on April 24, 1978 and, after submission of authorities, ruled the confession admissible. The Virginia Supreme Court, in an opinion dated June 8, 1979, sustained the trial court's ruling on the suppression motion, and made clear that the motion was based on federal constitutional grounds, and was renewed at every appropriate stage throughout the proceedings to that point. See

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App., pp. 9-13.

In July of 1978, the petitioner was tried before a jury in Roanoke, Virginia, upon the three charges of robbery, capital murder in the commission of armed robbery, and use of a firearm in the commission of murder. At the close of the evidence in that trial, the trial court, on motion of both the prosecution and the defendant, instructed the jury, inter alia, that "if under Count II of the indictment [capital murder], you find the defendant guilty of capital murder, then you must find him not guilty under Count I [robbery] of the indictment," and further instructed the jury that "if you find the defendant guilty of capital murder, then you must find the defendant not guilty of robbery, inasmuch as the elements of robbery are integral parts of the elements of the offense of capital murder in this case." App., pp. 16-17

After due deliberation, the jury returned its verdict, finding the defendant guilty of capital murder and not guilty of robbery. The trial judge subsequently entered an order confirming the jury's verdicts, and sentencing the defendant to death on the capital murder conviction. App., p.17.

Upon the automatic review of death sentence cases mandated by Virginia law, the Supreme Court of Virginia vacated and remanded the capital murder conviction, due to error in jury instructions regarding principals, compounded by erroneous closing arguments of the prosecuting attorneys. In this opinion, as noted, the Virginia Court also sustained the admission of the defendant's confession into evidence. App., p. 13.

When the case was returned to the trial court, the petitioner, in writing and orally, renewed his motions regarding exclusion of the confession on federal constitutional grounds, which motions the trial judge denied throughout, on the basis of the

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Virginia Supreme Court's rulings. The petitioner also on July 19, 1979, filed a motion seeking to have the trial court dismiss or reform the capital murder indictment, contending that, since the first jury had acquitted him of robbery, he could not (on grounds of double jeopardy; collateral estoppel and autrefois acquit) be tried for capital murder because robbery is a lesser included offense to capital murder in the commission of armed robbery. This motion, renewed at every appropriate stage, was denied by the trial court. See App., p.3.

After a change of venue to Alexandria, Virginia, the petitioner was again tried for capital murder, and a jury again pronounced him guilty. At this trial, however, he received a sentence of life imprisonment. App., p.16.

The defendant again appealed to the Supreme Court of Virginia, alleging as errors both the admission of his confession and the violation of his constitutional rights not to be placed in jeopardy for capital murder after a jury had acquitted him of a lesser-included offense. A copy of his "assignments of error" to the Virginia Supreme Court is included in an appendix hereto, App., p.14. That court chose not to review the confession question again, but did grant discretionary review on the double jeopardy question. App., p.15. In that review, the Virginia Supreme Court held that the second trial for and conviction of capital murder did not violate the double jeopardy clause of the Constitution, and affirmed the conviction, entering its final order in the matter. App., pp. 16 et seq.

The petitioner now seeks certiorari to the Supreme Court of Virginia to review its decision on the double jeopardy question, and also on the confession question, where the decision below was not final until conclusion of the second appeal.

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REASONS FOR GRANTING THE WRIT

I. THE VIRGINIA SUPREME COURT IMPROPERLY CONSTRUED UNITED STATES v. SCOTT IN HOLDING THAT A JURY'S DIRECTED VERDICT OF "NOT GUILTY" WAS NOT AN "ACQUITTAL" FOR DOUBLE JEOPARDY PURPOSES.

In 1962, this Court held that a directed jury verdict of acquittal in a criminal case was, on double jeopardy grounds, a bar to any further proceedings. Fong Foo v. United States, 369 U.S. 141, 82 S. Ct. 671, 7 L.Ed. 2d 629 (1962). Notwithstanding the Fong Foo decision, the Virginia Supreme Court has held in the instant case that a jury's directed not guilty verdict on a robbery charge is no bar to further prosecution, conviction and punishment for an offense in which the same robbery charge was lesser-included. The decision below was based squarely upon the perception that in United States v. Scott, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed. 2d 65 (1978), this Court created a new test of the sort of acquittal necessary to invoke double jeopardy protections. The Virginia Court's reading of the Scott decision appears to be a novel one; it extends well beyond the factual pattern present in Scott; and it appears to ignore the teachings of Fong Foo.

The conviction involved in the instant petition arose in the petitioner's second trial for one type of "capital murder" under Virginia law, murder in the commission of armed robbery. At the first trial, the petitioner was charged both with capital murder and with the underlying robbery. At the request of prosecution and defense, the judge who presided at that trial instructed the jury that, in the event it returned a guilty verdict on the capital murder charge, then it must find the defendant not guilty of robbery, "inasmuch as the elements of robbery

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are integral parts of the elements of the offense of capital murder in this case." The jury at that trial did, in fact, convict the defendant of capital murder and acquit him of the underlying robbery. The petitioner concedes that the robbery acquittal was based on the trial court's intructions and was therefore, for all practical purposes, a directed verdict.

The conviction of capital murder was later vacated and remanded by the Virginia Supreme Court based upon error in other jury instructions, and in final argument. Thereupon, the petitioner contended, as he continues to do, that to re-try him on the capital murder charge after he was acquitted of a lesser-included underlying charge would violate the constitutional prohibitions against double jeopardy. He now seeks review of a conviction of capital murder at such a second trial.

Fundamental to the petitioner's position below was the contention that the double jeopardy clause bars prosecution and punishment for a greater offense (murder in the commission of armed robbery) after acquittal of a lesser included offense (the same robbery). In essence, the Court below seems to have accepted this contention, but to have focused on what constituted an acquittal for double jeopardy purposes and, based on an erroneous reading of Scott, to have held that the verdict in the first trial was not such an acquittal.

It is clear that robbery is a lesser-included offense to capital murder under Virginia Code §18.2-31(d) (murder in the commission of robbery while armed with a deadly weapon), for proof of "the commission of robbery"--the same robbery--is a necessary precondition to the capital murder conviction. As the Virginia Supreme Court has noted,

> If all the elements of a given offense are to be found in another offense, the former is necessarily included in the latter....[A]ll the legal ingredients of the corpus delicti of the

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> lesser offense [are here] included in the elements of the greater offense...,

and every "element necessary to establish the corpus delicti of the lesser offense" is relevant and essential "to the proof of the greater offense." Jones v. Commonwealth, 218 Va. 757, 759, 240 S.E. 2d 658 (1978), cert. denied 435 U.S. 909. A conviction of robbery would not require the proof of any facts not essential for the capital murder conviction. See Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932); Brown v. Ohio, 432 U.S. 161, 166, 97 S.Ct. 2221, 53 L.Ed. 2d 187 (1977). In fact, in the decision which the petitioner now seeks to have reviewed, the Virginia Supreme Court noted that

> if defendant, after being convicted of both crimes, had been subjected to punishment for both, an issue of double jeopardy with regard to multiple punishments would arise.

App., p.20. Thus, the court below would seem to concede that robbery is a lesser-included offense to capital murder in this case. And, it is well settled that the double jeopardy clauses forbid not only subsequent punishment, but subsequent prosecution; they apply not only when two offenses are identical, but also when the former offense is lesser-included in the subsequent offense. They protect against a second prosecution after acquittal for a lesser-included offense. See, e.g., North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed. 2d 656 (1969); Jones v. Commonwealth, supra, 218 Va. 15 759, and cases cited in both decisions. Even though prosecution for the greater offense does not expose the defendant to the risk of a conviction for the lesser included offense of which he has been acquitted, "when the elements of the lesser included offense must be proved again in order to prove the greater offense, Double Jeopardy should apply." Jarvis v. Knowlton, 459 F. Supp. 687, 698 (N.D. Tex. 1978).

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Indeed, unless the jury's acquittal of robbery be deemed not an acquittal for double jeopardy purposes, then it would seem that this Court's decision in Harris v. Oklahoma, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed. 2d 1054 (1977) controls. When, as here, conviction of the greater crime cannot be had without conviction (i.e., proof) of the lesser crime, the double jeopardy clause bars prosecution for the greater crime after conviction for the lesser one.

The court below avoided the application of the Harris holding by stating that

> the dispositive issue is whether for double jeopardy purposes there has ever been a factual acquittal of the defendant on the robbery charge.

App., p.21 (emphasis supplied), and answered that question by stating that the petitioner,

> aided by the Commonwealth's Attorney and the [first] trial judge, successfully obtained a termination of his prosecution on the robbery charge without any determination of his factual guilt or innocence under this [robbery] count. On the contrary, the jury was directed to return the verdict it did

because it found that murder was committed during the course of an armed robbery. Id.

The lower court's focus on a "factual acquittal" arises from what the petitioner believes to be a misconstruction of this Court's decision in Scott, supra, 437 U.S. 82. "It appears," the Virginia Court held

> that the Court in Scott approved a new definition of the acquittal required to invoke a double jeopardy defense....a legal dismissal might not [qualify as an acquittal for double jeopardy purposes] because its effect could result in termination of the proceedings against the defendant on a basis unrelated to factual guilt or innocence. This rationale applies in the instant case. Here, the directed "not guilty" verdict depended legally upon a finding of factual guilt

of premeditated murder in the commission of armed robbery. App., p.24.

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Such a reliance upon Scott markedly extends the authority of that decision beyond its facts, and also fails to consider Fong Foo.

In Scott, a District Judge, at the close of the evidence at trial, granted the defendant's motion to dismiss two counts of an indictment, based on pre-indictment delay. Only the third count of the indictment was submitted to the jury, which returned a verdict of not guilty on that count.

The defendant's motion to dismiss originally had been made prior to trial, and the defendant conceded that, had the motion then been granted, the government could have appealed the dismissal.

The government sought to appeal the dismissal of the first count of the indictment, and this Court held such an appeal did not violate the double jeopardy clause. The defendant had deliberately chosen "to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence"; he had "obtain[ed] the termination of the proceedings against him in the trial court without any finding by a court or jury as to his guilt or innocence." Scott, Id., 437 U.S. at 97-100.

A key aspect of the factual situation presented in Scott, and noted by this Court, is that no jury verdict had been rendered. In the instant case, however, the jury had returned a not guilty verdict, sharply distinguishing this case from Scott.

Fong Foo v. United States, supra, 369 U.S. 141, discussed by this Court in Scott, is substantially more apposite to the instant case than is Scott. The conflict between the holding of Fong Foo and the Virginia Court's reading of Scott makes this an appropriate case to grant certiorari in order to explicate Scott and affirm the continued vitality of Fong Foo.

In Fong Foo, after seven days of trial , the District

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Judge directed the jury to return verdicts of acquittal, and a formal judgment of acquittal subsequently was entered. "The trial," as in the instant case,

> did not terminate prior to the entry of judgment.. ..[but] with the entry of a final judgment of acquittal....The Court of Appeals thought, not without reason, that the acquittal was based upon an egregiously erroneous foundation. Nevertheless, [t]he verdict of acquittal was final

for double jeopardy purposes. Id., 369 U.S. at 143.

In the instant case, it may be conceded, the jury's verdict came upon a directed verdict of acquittal, and the Virginia Supreme Court somewhat criticized the trial judge for directing such a verdict. It may be conceded that the basis for the directed verdict was legal, rather than factual (although the trial court's direction was not "egregiously erroneous"). Nonetheless, Fong Foo stands squarely for the proposition that a directed verdict of acquittal--however unsound the foundation upon which that directed verdict lies--is final for double jeopardy purposes. See also Finch v. United States, 433 U.S. 676, 97 S. Ct. 2909, 53 L.Ed. 2d 1048 (1977) (dismissal granted by the trial court "on the ground, correct or not, that the defendant simply cannot be convicted of the offense charged;" double jeopardy barred appeal); United States v. Martin Linen Supply Co., 430 U. S. 564, 97 S.Ct. 1349, 51 L.Ed. 2d 642 (1977) (after jury deadlocked, trial judge granted defendant's motion that acquittal be entered, remarking that the prosecution's case was "weak" and had not been proven. For all purposes, including double jeopardy, this was an acquittal); c.f. Sanabria v. United States, 437 U.S. 54, 98 S.Ct. 2170, 57 L.Ed. 2d 43 (1978) (as the result of an erroneous evidentiary ruling, the trial court struck evidence and entered a judgment of acquittal, which was final for double jeopardy purposes).

It is also of interest to note that, with the exception

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of the Virginia Supreme Court, the courts below seem to have restricted application of the doctrine of Scott to fact patterns similar to those presented in the case itself. See, e.g., United States v. Cheiman, 578 F. 2d 160 (6th Cir. 1978); United States v. Blasco, 581 F. 2d 681 (7th Cir. 1978); Sedgwick v. Superior Court, 584 F. 2d 1044 (D.C. Cir. 1978), cert. denied, 439 U.S. 1075, 99 S.Ct. 849, 59 L.Ed. 2d 42 (1979); United States v. Glist, 594 F. 2d 1374 (10th Cir. 1979); United States v. Burns, 597 F. 2d 940 (5th Cir. 1979); United States v. Bernardi, 629 F. 2d 723 (2d Cir. 1980).

This Court, in Scott, spoke of "venerable principles of double jeopardy jurisprudence," one of which is that

> [a] judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal.

Scott, supra, 437 U.S. at 90-91. And this Court noted that "the law attaches particular significance to an acquittal." Id.. The holding of Scott is that

> it is not all proceedings requiring the making of supplemental findings that are barred by the Double Jeopardy Clause, but only those that follow a previous trial ending in an acquittal.

Swisher v. Brady, 438 U.S. 204, 218, 89 S.Ct. 2699, 57 L.Ed. 2d 705 (1978).

In relying on Scott for the proposition that a jury's verdict of acquittal could be other than final for double jeopardy purposes, the Virginia Supreme Court seems to have misconstrued the constitutional weight that this Court gives a jury's not guilty verdict, and seems either to have ignored the holding of Fong Foo, or to have concluded that Scott, by implication, overruled Fong Foo in a situation in which the trial judge's direction of a verdict was based upon legal grounds. To review

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such an overreaching reading of Scott, the petitioner believes the certiorari should be granted.

II. THIS COURT SHOULD SETTLE A CONSIDERABLE CONFLICT AMONG THE COURTS OF APPEAL AND STATE COURTS OF LAST RESORT, AND HOLD THAT THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION REQUIRE THAT A CRIMINAL DEFENDANT'S CONFESSION BE EXCLUDED FROM EVIDENCE WHEN, PRIOR TO MAKING THE CONFESSION, HE REQUESTED AN ATTORNEY AND THEREAFTER, BEFORE HE HAD THE OPPORTUNITY TO CONFER WITH HIS ATTORNEY, THE POLICE INITIATED A NEW CUSTODIAL INTERROGATION SESSION AND OBTAINED AN INCULPATORY STATEMENT.

In the fifteen years since Miranda,[1] this Court has not taken the opportunity to clarify the rules applicable when a criminal defendant has unequivocally asserted his right to counsel and is nonetheless then interrogated by police officers before he has had the opportunity to confer with his attorney. Particularly in recent years, however, questions arising in the context of police-initiated custodial interrogation after assertion of right to counsel have been decided regularly in the lower courts, with the result that a confusing plethora of lower court decisions now exists. It would appear that the federal Circuits are in considerable conflict over questions arising in this important Constitutional context, and it further appears that the decision of the Virginia Supreme Court in this case is in conflict with the principles enunciated by the Fourth Circuit Court of Appeals (whose jurisdiction includes Virginia) for similar cases.

In the instant case, the petitioner was arrested on December 12, 1977. On the morning of December 13, at his arraign-

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[1] Miranda v. Arizona, 384 U.S. 436, 88 S.Ct. 1602, 16 L.Ed. 2d 694 (1966).

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ment in state court, he affirmatively requested that counsel be appointed to represent him.[2] Later that same day, before petitioner had had the opportunity to confer with counsel, a police detective (who testified that he neither knew nor cared whether counsel had been appointed for the defendant) initiated a new interrogation session in the city jail, read the petitioner the "Miranda warnings," obtained his signature on a "waiver card," and proceeded to take an inculpatory statement from him.

Applying dictum from an earlier Virginia case, the Virginia Supreme Court held that, since the petitioner had, at this interrogation session, affirmatively waived his Miranda rights, his previous assertion of a desire for counsel was legally irrelevant. Accordingly, a trial judge's denial of a suppression motion was sustained, and the confession was allowed in evidence at both the first and second trials.

The decision of the Virginia Court is at odds with decisions reached by Courts of Appeals and other state courts of last resort.

Some Courts have taken a rather absolutist view, quite at odds with the decision below. For example, the Third Circuit has held, as a matter of constitutional principle, that, once the right to counsel has attached (as in the case of a custodial interrogation), then any confession obtained in the absence of counsel "must be suppressed independent[ly] of any issue of the voluntariness of the confession." United States ex rel. O'Connor v. New Jersey, 405 F. 2d 632, 636 (3d Cir. 1969) cert. denied,

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[2]The Court below "assume[d], but [did] not decide, that defendant is correct in that part of his argument in which he maintains that a request for the appointment of an attorney at arraignment constitutes an exercise of the right to counsel requiring the cessation of police interrogation under Miranda." App., pp. 11-12.

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sub nom Yeager v. O'Connor, 395 U.S. 923.

And the Tenth Circuit, in an oft-quoted statement, has said that

> [O]nce a criminal defendant has either retained an attorney or had an attorney appointed for him by the court, any statement obtained by interview from such defendant may not be offered in evidence for any purpose unless the accused's attorney was notified of the interview which produced the statement and was given a reasonable opportunity to be present. To hold otherwise, we think, would be to overlook conduct which violated both the letter and the spirit of the canons of ethics. This is obviously not something which the defendant alone can waive.

United States v. Thomas, 474 F. 2d 110, 112 (10th Cir. 1973), cert. denied, 412 U.S. 932, 93 S.Ct. 2758, 37 L.Ed. 2d 160 (1973);[3] accord, United States v. Howard, 426 F. Supp. 1067 (W.D. N.Y. 1977);[4] compare, Lamb v. Commonwealth, 217 Va. 307, 227 S.E. 2d 737 (1976) (relied upon in the decision below).

Likewise, the Fifth Circuit has held that, once it appears that counsel has been requested prior to any questioning (as in this case), then, "a finding of knowing and intelligent waiver of the right to an attorney is impossible." United States v. Priest, 409 F. 2d 491, 493 (5th Cir. 1969); compare, Biddy v. Diamond, 516 F. 2d 118 (5th Cir. 1975)[5]

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[3] In Thomas, unlike the present case, the defendant initiated the interview with law enforcement officers, 474 F. 2d at 110, and the confession was used in cross-examination, rather than in the prosecution's case-in-chief, Id. Since the Thomas decision was based on ethical, rather than constitutional grounds, Id. at 112, c.f., Virginia Code of Professional Responsibility, II:DR 7-104(A), the decision's application was purely prospective, not requiring reversal.

[4] Where the defendant, personally, had not even requested counsel. 426 F. Supp. at 1069. This decision has both constitutional and ethical bases. Id. at 1071-72

[5] In which the defendant (a) had had numerous opportunities to consult with counsel; (b) was not in custody; (c) had not been arrested and arraigned; and (d) had come to the police station more or less voluntarily, and (e) where the defendant's lawyer was apprised, in his client's presence, that the police "might wish to question" the defendant. A confession here was ruled properly admitted.

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Such absolute views, or per se exclusions, are also espoused by the courts of New York, on both constitutional and ethical grounds. People v. Hobson, 39 N.Y. 2d 479, 384 N.Y.S. 2d 419, 348 N.E. 2d 894 (1976).

The Court of Appeals for the Fourth Circuit has not adopted a per se rule of exclusion, but has adopted a test which, it appears, would have resulted in suppression of the petitioner's confession in this case, had he been on trial in federal, rather than state court in Virginia. United States v. Clark, 499 F. 2d 802 (4th Cir. 1974). It should be noted, however, that the Virginia Supreme Court, in its opinion below, felt that Clark "is distinguishable" from the instant case. App., p. 12.

In Clark, the defendant, at a bond hearing, was found not to be entitled to court-appointed counsel as an indigent. After the hearing, an F.B.I. agent read Clark his Miranda rights, after which he said "I'd better talk to a lawyer." Less than four hours later, the F.B.I. agent again visited the defendant in custody, and again asked him to submit to questioning. This time, Clark orally wavied his rights to silence and counsel, and made an oral confession. Clark, 499 F. 2d at 804-05.

The Fourth Circuit (unlike the courts previously cited) held that the defendant could waive his previously asserted right to counsel. Id., at 807. However, the Court noted that

> evidence that an accused has previously asserted his right to confer with counsel is a factor which weighs heavily against a finding that a subsequent uncounseled confession is voluntary. See United States v. Slaughter, 366 F. 2d 833, 840-841 (4 Cir. 1966).

Id. Additionally, the Court noted that (as in the case sub judice), the law enforcement officers had initiated the interview during which the defendant had made his alleged waiver and confessed. The police initiation of the interview was held to be

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a factor which "is a strong indicator of involuntariness." Id.

The Clark court held that, "at the very least," the defendant should have been afforded sufficient time to employ and consult with counsel before law-enforcement officers initiated any subsequent interviews. Id.[6] Accordingly, the confession was suppressed. Id. at 808.

In Lamb, supra, 217 Va. at 310, the Virginia Supreme Court noted that this Court "has not gone so far" as to promulgate fixed rules for the consideration of custodial confessions obtained in the absence of and without the knowledgeor permission of counsel. As this Court considers whether it is time to enunciate such rules, it is useful to note that even many of the courts which have found such interrogations to be technically permissible have expressed their disapproval of the practice. United States v. Cobbs, 481 F. 2d 196, 200 (3d Cir. 1973), cert. denied, 414 U.S. 980, 94 S. Ct. 298, 38 L.Ed. 2d 224 (1973),[7] Coughlin v. United States, 391 F. 2d 371, 372 (9th Cir. 1968), cert. denied, 393 U.S. 870, 89 S.Ct. 159, 21 L.Ed. 139 (1968),[8]

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[6] "If the individual states that he wants an attorney.. ..the individual must have an opportunity to confer with the attorney...." Miranda v. Arizona, supra, 384 U.S. at 473-74 (emphasis supplied).

[7] Note also that two days elapsed between the defendant's incarceration and the confession in question. This decision also says that the evidence in support of voluntary waiver "should include evidence to the effect that the accused, prior to making a statement, specifically acknowledged that he was aware that he was represented by an attorney." 481 F. 2d at 200. The Third Circuit has vacillated on this question. Compare United States ex rel. O'Connor v. New Jersey, supra, 405 F. 2d at 636, and authorities there cited.

[8] Where it also appeared that the father of the 19-year old suspect requested that the officers talk to his son in jail. 391 F. 2d at 372, n.4. For the variety of approaches the Ninth Circuit has taken, see United States v. Rodriguez-Gastellum, 569 F. 2d 482.

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United States v. Springer, 460 F. 2d 1344, 1352 (7th Cir. 1972) cert. denied, 409 U.S. 873, 93 S. Ct. 2758, 37 L.Ed. 2d 160;[9] Wilson v. United States, 389 F. 2d 331, 333 (5th Cir. 1968);[10] Walls v. State, 368 N.E. 2d 1373 (Ind. App. 1977); State v. Renfrew, 280 Minn. 276, 159 N.W. 2d 111, 113 (1968).[11]

In accordance with the position that petitioner maintained in the Court below, and indicative of the variety of decisions in lower courts on similar questions, see also State v. Jones, 19 Wash. App. 850, 578 P. 2d 71, 73 (1978); People v. Davis, 568 P. 2d 1175 (Colo. 1977); Dryden v. State, 535 P. 2d 482, 492-95 (Wyo. 1975); State v. Moore, 27 Ariz. App. 275, 554 P.2d 643, 645-46 (1976).

When the motion to suppress the petitioner's inculpatory statement came on for hearing before the original trial judge, he did not base his decision to admit the statement on Virginia interpretations of federal constitutional protections (as did the Virginia Supreme Court), but rather on this Court's decision in Michigan v. Mosley, 423 U.S. 96, 96 S. Ct. 321, 46 L.Ed. 2d 313 (1975). It is possible that a proper reading of Mosley would mandate that the instant confession be excluded. If that is so, then it would be useful for this Court to grant certiorari not only to settle the conflict that exists among the

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[9]Note also that, even in this unusual factual situation, Judge (now Mr. Justice) Stevens found both constitutional and ethical violations, 460 F. 2d at 1354 (dissent of Stevens, J.). Compare, United States v. Durham, 475 F. 2d 208, 211 (7th Cir. 1973); c.f., United States v. Nielson, 392 F. 2d 849, 852-53 (7th Cir. 1968); United States v. Smith, 379 F. 2d 628, 633 (7th Cir. 1967).

[10]Compare, United States v. Massey, 550 F. 2d 300, 307-08 (5th Cir. 1977); United States v. Priest, supra, 409 F. 2d 491, 493 (5th Cir. 1969)

[11]Where the defendant had initiated the conversation. Compare, State v. Fossen, 255 N.W. 2d 357, 362 (Minn., 1977).

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lower courts, but also to explicate the Mosley decision.

The Ninth Circuit, en banc, has explained that

> Mosley held only that a suspect who has been properly advised of his rights, and who has invoked his right to silence, but not his right to counsel, can use his own judgment in talking to officers about other crimes if he is advised of his rights before each interrogation.

United States v. Rodriguez-Gastellum, 569 F. 2d 482, 484 (9th Cir. 1978) (en banc) cert. denied, 436 U.S. 919, 98 S. Ct. 2266, 56 L.Ed. 2d 760.

In Rodriguez-Gastellum, the full Ninth Circuit, settling a conflict among its panels, rejected a per se rule of exclusion. It is possible, however, that, when it comes to the right of counsel, Mosley is not so limited as the Ninth Circuit believes. Mr. Justice White, concurring in Mosley, emphasized that while it may be permissible under certain circumstances to resume an interrogation after a suspect has asserted his right to remain silent, the same considerations do not apply when a request has been made for an attorney. For,

> the reasons to keep the lines of communication between the authorities and the accused open when the accused has chosen to make his own decisions are not present when he indicates instead that he wishes legal advice with respect thereto. The authorities may then communicate with him through an attorney....[A] later decision at the authorities' insistence to make a statement without counsel's presence may propery be viewed with skepticism.

Michigan v. Mosley, supra, 423 U.S. at 110, n.2 (White, J., concurring); quoted with approval in Brewer v. Williams, 430 U.S. 387, 405 n.10, 97 S. Ct. 1232, 51 L.Ed. 2d 424 (1977). This statement indicates that, in the view of at least one member of this Court,[12] it is legally impossible to waive the right to counsel, after request for counsel but prior to consultation with an

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[12] See also United States v. Springer, supra, 460 F. 2d at 1354 (Stevens, J., dissenting).

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attorney. Mr. Justice White states that in Miranda, this Court "create[d] a per se rule against interrogation after assertion of a right" to counsel. Michigan v. Mosley, supra, 423 U.S. at 109 (White, J., concurring). But see United States v. Grant, 549 F. 2d 942, 946, n.2 (4th Cir. 1977), cert. denied 423 U.S. 908. Brewer did not settle this question, although this Court in that case specifically avoided considering whether the defendant (who had already conferred with counsel) could not have waived his right to counsel. Brewer v. Williams, supra, 430 U.S. at 405-06. If the views expressed by Mr. Justice White are those of this Court, then Mosley demonstrates that the Virginia Supreme Court's decision below was constitutionally erroneous. If, on the other hand, Mr. Justice White's well-reasoned views do not command a majority on the Court, then it is submitted that certiorari should still be granted to settle the question of what rules should apply in situations analagous to that presented here. The plethora of lower court decisions, and the conflicting rationales for those decisions, suggest that the time has come for this Court to issue a definitive ruling on the subject.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgments and opinions of the Supreme Court of Virginia.

Respectfully submitted,

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April 15, 1981

APPENDIX

PRESENT: All the Justices

MAJOR HENRY JOHNSON, JR.

v. Record No. 781678

COMMONWEALTH OF VIRGINIA

OPINION BY JUSTICE A. CHRISTIAN COMPTON
June 8, 1979

FROM THE CIRCUIT COURT OF THE CITY OF ROANOKE
Ernest W. Ballou, Judge

In this criminal appeal, we review the capital murder conviction of Major Henry Johnson, Jr.

On July 26, 1978, Johnson, then 26 years of age, was convicted of wilful, deliberate and premeditated murder during the commission of robbery while armed with a deadly weapon. Code § 18.2-31(d). He was also convicted of using a firearm during the commission of a felony and sentenced to one year imprisonment in the penitentiary. Code § 18.2-53.1. Pursuant to the statutory scheme set forth in Code §§ 19.2-264.3 and -264.4, the jury reconvened and, after hearing evidence on July 27, 1978, on Johnson's prior criminal record and upon other matters relevant to sentencing, recommended imposition of the death penalty. The jury's recommendation was accepted by the trial court and the death penalty was imposed at the sentencing hearing held on August 21, 1978. Code § 19.2-264.5.

The murder victim, John Gardner, president of a real estate company located in Roanoke, rented an apartment to the defendant. Living with defendant was his younger brother, David Allen Johnson. On December 9, 1977, the brothers went to Gardner's office ostensibly to pay overdue rent, but with the joint purpose of robbing Gardner. During the commission of the robbery, Gardner was fatally wounded. The medical evidence adduced at trial indicated that the victim died as a result of three gunshot wounds found on the back of his head and neck. Any one of the wounds would have caused instantaneous loss of consciousness, and death

would have resulted in "a matter of minutes." Apparently, just one weapon was used in the murder and robbery. Only the perpetrators of the crime witnessed its commission.

Defendant and his brother were arrested separately on December 12, 1977. The brother first confessed on December 13, 1977, at 1:25 a.m. In that account, the brother stated that he fired the three shots which killed Gardner. The brother next talked to the police at 1:10 p.m. on December 13, at which time he stated that the defendant fired all of the shots. The defendant talked to police briefly on December 12 at 11:11 p.m. but "said very few words". On December 13 at 2:18 p.m., the defendant confessed to police that he fired the three fatal shots.

At trial, the defendant testified that his brother fired the shots. The defendant asserted that his confession was not true and that he made the statement assuming responsibility for the crime because his brother had a "clean record". The brother, testifying at trial, maintained that the defendant fired the fatal shots and explained his first confession, which admitted commission of the murder, by stating that he believed the defendant had terminal cancer and that he made the statement to "protect" defendant. The brothers' testimony at trial conflicted on almost every aspect of the commission of the crime.

Initially, defendant asserts that the trial court misapplied the law dealing with principals in the first and second degree as that subject relates to capital murder and, consequently, misdirected the jury and authorized improper closing argument by the prosecutors.

When, as here, the offense constituting the charge of capital murder is the wilful, deliberate and premeditated killing of a person in the commission of robbery while armed with a deadly weapon, Code § 18.2-31(d), only the actual perpetrator of the crime may be convicted of capital murder. Code § 18.2-18. That

section provides:

> § 18.2-18. How principals in second degree and accessories before the fact punished.—In the case of every felony, every principal in the second degree and every accessory before the fact may be indicted, tried, convicted and punished in all respects as if a principal in the first degree; provided, however, that except in the case of a killing for hire under the provisions of § 18.2-31(b) an accessory before the fact or principal in the second degree to a capital murder shall be indicted, tried, convicted and punished as though the offense were murder in the first degree.

The proviso in this statute was added by the General Assembly in 1977. Acts 1977, ch. 478. Prior to this amendment, in the case of every felony in Virginia a principal in the second degree could be indicted, tried, convicted and punished as if a principal in the first degree. As the result of the amendment, however, it is now essential in a prosecution for capital murder, except in the case of murder for hire, that the heretofore unnecessary distinction be drawn between principals in the first and second degree, assuring that only the person who is the immediate perpetrator may be a principal in the first degree and thus liable to conviction for capital murder. Indeed, the Attorney General does not dispute that proposition, stating on brief, that: "It is the position of the Commonwealth that the defendant cannot be convicted of capital murder by [evidence which shows that the defendant merely planned] the robbery and that a death ensued during the commission of the robbery, regardless of who committed the killing."

The correctness of the foregoing rule is made plain when the exception contained in the proviso is considered. Excluded from the operation of the proviso is the case of a killing for hire constituting capital murder under subsection (b) of Code § 18.2-31.*

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* § 18.2-31. Capital murder defined; punishment. — The following offenses shall constitute capital murder, punishable as a Class 1 felony:

(a) The willful, deliberate and premeditated killing of any person in the commission of abduction, as defined in § 18.2-48, when such abduction was committed with the intent to extort money, or a pecuniary benefit;

(b) The willful, deliberate and premeditated killing of any person by another for hire;

(c) The willful, deliberate and premeditated killing of any person by an inmate in a penal institution as defined in § 53-19.18, or while in the custody of an employee thereof;

(d) The willful, deliberate and premeditated killing of any person in the commission of robbery while armed with a deadly weapon;

(e) The willful, deliberate and premeditated killing of a person during the commission of, or subsequent to, rape; and

(f) The willful, deliberate and premeditated killing of a law-enforcement officer as defined in § 9-108 when such killing is for the purpose of interfering with the performance of his official duties.

Manifestly, the General Assembly realized that, without the exception, a person who conceived and instigated a murder for hire, and who procured the agent who actually committed the homicide, could not be convicted of capital murder unless he directly participated in the act causing the victim's death. To endorse the theory (adopted, as we shall see, by the trial court and prosecutor below) that a capital conviction may result from a common plan and that the accused may be a principal in the first degree even though he did not perform the homicidal act, would render meaningless the exception contained in § 18.2-18 in most murder for hire situations. Thus, in order to convict this defendant of capital murder, the jury was required to find that he actually fired the fatal shot.

Against the background of the conflicting testimony of the brothers, the absence of other probative evidence as to the identity of the actual triggerman, and the limitation imposed by Code § 18.2-18, at least four instructions on the subject of principals were given and two were refused by the court below. Instruction 4, which was given, stated:

> The Court instructs the jury that if you believe from the evidence beyond a reasonable doubt that David Johnson and the defendant had agreed, planned or designed to rob or commit larceny from John Gardner, and that while engaged in carrying out such plan David Johnson and Major Johnson were present, aiding, abetting and sharing the intention of the other, and that while so engaged Major Johnson or David Johnson shot and killed John Gardner, and that such a shooting should have been contemplated as a probable result of the execution of such common design, then even though you are unable to determine which of them fired the fatal shot, each is equally guilty of whatever degree of homicide, if any, the jury finds to have been committed under the evidence and other instruction of the Court.

The defendant objected to Instruction 4 and proffered Instructions A and B instead: Instruction A provided:

> The Court instructs the jury that in order to find the defendant guilty of capital murder, you must find beyond a reasonable doubt that the defendant actually fired the shot or shots that killed John Gardner.

Instruction B was almost identical to Instruction 4 and provided:

> The Court instructs the jury that if you believe from the evidence beyond a reasonable doubt that David Johnson and the defendant had agreed, planned or designed to rob or commit larceny from John Gardner, and that while engaged in carrying out such plan David Johnson and the defendant were present, aiding, abetting and sharing the intention of the other, and that while so engaged one of them shot and killed John Gardner, and that such a shooting should have been contemplated as a probable result of the execution of such common design, then even though you are unable to determine which of them fired the fatal shot, each is equally guilty of whatever degree of homicide, if any, the jury finds to have been committed under the evidence and other instructions of the Court. The Court further instructs you, however, that if you are not able to determine beyond a reasonable doubt which person fired the fatal shot, then you cannot convict the defendant of capital murder, as defined in the other instructions of this Court.

(Emphasis indicates material differences between refused Instruction B and granted Instruction 4.)

The trial judge also gave Instruction 5 which informed the jury that they could find the defendant guilty of capital murder if they believed beyond a reasonable doubt "that the defendant wilfully, deliberately and premeditatedly killed John Gardner, and at the time of any such killing the defendant was committing robbery while armed with a deadly weapon. . . ." Instruction 6, given by the trial judge, provided:

> The Court instructs the jury that principals in the first degree are those who are the actual or immediate perpetrators of the crime. Principals in the second degree are those who did not with their own hands commit the act which constituted the crime, but who were present, aiding and abetting in its commission. The test for a principal in the second degree is whether he was encouraging or inciting the commission of a crime by words, gestures, looks or signs, or in some manner offering aid or consent to its commission.
>
> Principals in the second degree are liable to the same punishment as principals in the first degree, except that principals in the second degree cannot be convicted of capital murder.
>
> Therefore, if you find from the evidence that the defendant is a principal in the second degree to capital murder, you cannot find him guilty of capital murder.

Instruction 10, given by the trial court, informed the jury that if they believed

beyond a reasonable doubt that [the defendant's brother] was guilty of the murder of John Gardner, and further believe from the evidence beyond a reasonable doubt that the defendant was present, aiding and abetting as a principal in the second degree in the commission of such crime, as defined in another instruction of the Court, then you shall find the defendant guilty of murder in the first degree . . . .

In his ruling refusing Instructions A and B, the trial judge stated that he believed "that if two persons acting in concert previously planned to commit Robbery and Murder, committed the robbery and murder, then each would be guilty as a principal in the first degree." Therefore, the court informed the attorneys that Instruction 4 was a correct statement of the law and that the theory advanced by the defendant in Instruction B would be refused.

As a result of this ruling and over defendant's objection, the prosecutors repeatedly asserted in their closing and rebuttal argument that the jury could find the defendant guilty of capital murder on two theories. First, it was argued that the defendant clearly pulled the trigger and was guilty of capital murder. Second, the contention was made that the jury could convict the defendant of capital murder "regardless of who pulled the trigger." The following excerpts are representative of the prosecutors' statements advancing the second theory:

[I]f you find that David and Major Johnson planned to commit a robbery from John Gardner and together, that they went down to execute that plan, and in the course of the execution of that plan, John Gardner was killed while they were committing a robbery with a deadly weapon, that is Capital Murder regardless of who pulled the trigger.

* * *

Now, here is the most important thing in all of that. Whether you believe who pulled the trigger or whatever, he [the defendant] is guilty of Capital Murder. The reason he is guilty of Capital Murder is because he is a principal in the first degree. The reason he is a principal in the first degree is because he planned the robbery. He had his brother buy the pistol. All the plans are indicative of that, even from his statement, even from his statement on the stand, and even from the statement of David, which means that he is an integral part, not a bystander, not a principal in the

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> second degree, but an active mover in the whole crime, with the crimes and the terrible death that Mr. Gardner suffered. So, therefore, he becomes a principal in the first degree, not . . . in the second. He is a prime mover. As a matter of fact, he planned it, he was there, and even if David Johnson did pull the trigger, which I indicate to you and I think the evidence has indicated, did not. This man pulled it, but even if David did, he is still guilty of Capital Murder because of the participation as a principal in the first degree.

While agreeing that refused Instructions A and B are correct statements of the law, the Attorney General maintains that the jury was charged adequately and correctly in Instructions 4, 5, 6 and 10. The Commonwealth asserts that the substantive provisions of Instruction A were covered in Instructions 5 and 6 and that the substantive provisions of Instruction B were covered in Instructions 4 and 6. The Commonwealth concludes that Instructions A and B were refused properly to avoid multiplicity.

With respect to the prosecutors' closing argument, the Attorney General concedes that the comments were erroneous but urges that the prosecutors' statements were not so prejudicial "as to deny the defendant a fair trial." Noting that in parts of their argument the prosecutors correctly stated the law applicable to capital murder, the Commonwealth contends that the argument contained "only a partial misstatement of the law" and that "not every misstatement of law in argument by the prosecution is reversible error if the argument taken as a whole was substantially correct in principle and supported by law and evidence." We reject the Attorney General's contentions both as to the instructions and the closing argument.

In order that instructions may inform the jury fully and fairly upon the law of the case applicable to the particular facts, they should not be drafted so as to confuse the jury. H. W. Miller Trucking Co. v. Flood, 203 Va. 934, 936, 128 S.E.2d 437, 439 (1962). And, where appropriate, instructions should be qualified by a cross-reference to another in "a manner which will

clearly convey to the jury the force and effect of the qualification." Outlaw v. Pearce, 176 Va. 458, 469-70, 11 S.E.2d 600, 605 (1940).

In the present case, Instructions 4, 5, 6 and 10, read individually, are correct statements of the law. But unitary accuracy will not suffice under the circumstances of this case. Instruction 4, read in the abstract, informs the jury that "even though . . . [the jury is] unable to determine . . . [who] fired the fatal shot," the defendant is "guilty of whatever degree of homicide, if any, the jury finds to have been committed under the evidence and other instruction of the Court." This instruction is qualified only by a general reference to "other instruction", not by a specific cross-reference to Instruction 6, the crucial limiting instruction involved here. The trial court should have either inserted in Instruction 4 a specific reference to Instruction 6 or added to Instruction 4 language similar to the emphasized portion of Instruction B, supra.

When the inadequacy inherent in Instruction 4 is combined with the admittedly erroneous portions of the Commonwealth's argument, it is manifest that an incorrect and confusing analysis of the law was presented to the jury. Based on the prosecutors' argument the jury could have believed that it could convict the defendant of capital murder though it was unable to determine who fired the fatal shots or if it determined that the defendant's brother fired the fatal shots. Instructions 6 and 10 were contradicted by the erroneous argument advanced under Instruction 4 and approved by the trial judge. Thus, this combination of factors caused the case to be submitted to the jury on conflicting statements of the law and the jury was permitted to convict the defendant of capital murder without having to resolve a factual issue which was essential to a proper verdict. This was error.

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Alternatively, the Attorney General argues, however, that the foregoing error was harmless. We think otherwise. As we have just said, the effect of the error was to permit a conviction of the accused of capital murder without requiring the jury to determine that defendant fired the fatal shot. Under the instructions, read singly without adequate qualification, and under the argument, the jury did not have to determine the identity of the triggerman. Because such a determination was crucial to a valid finding of capital murder, we conclude that the erroneous interpretation of the law conveyed in the form of the instructions and advanced by the closing argument constituted harmful, reversible error.

State v. Harris, 290 N.C. 681, 695-96, 228 S.E.2d 437, 445 (1976), relied upon by the Commonwealth, in inapposite. There, the prosecution in closing argument used imprecise language in defining the felony-murder rule for the jury. The evidence in Harris clearly supported the verdict reached and since the jury had been properly instructed, the North Carolina Supreme Court found that th "misstatements of law" involved were not material or prejudicial. As noted previously, the evidence before us is sharply conflicting. Because of the improper argument interpreting the instructions, we cannot determine how the jury resolved these conflicts, if they did. The misstatements of the law involved here went to the core of this case and cannot be dismissed as mere innocuous comments.

Because the case will be remanded for a new trial, we need address only one other assignment of error. Many of the issues raised by defendant have now been adjudicated by us in Smith v. Commonwealth, 219 Va. 455, 476-79, 248 S.E.2d 135, 148-49 (1978), cert. denied, ___ U.S. ___ (1979), a decision announced after the final judgment was entered in this case. We thus turn to defendant's contention that the trial court erred in failing to suppres his confession.

As noted previously, the defendant was arrested on December 12. At his 9:00 a.m. arraignment on December 13, pleading

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indigency, he asked the general district court to appoint counsel for him. The request was granted and the defendant was returned to the Roanoke City Jail. At 2:18 p.m. on that same day, Detective James C. Clingenpeel of the Roanoke City Police Department initiated an interview with defendant at the jail. Clingenpeel advised the defendant of his rights, according to Miranda v. Arizona, 384 U.S. 436 (1966), using a "rights card" which provided, in part:

> 3. You have the right to talk to a lawyer right now and have him present during the entire time you are being questioned.
>
> 4. If you cannot afford to hire a lawyer, one will be furnished to represent you before any questioning.
>
> 5. If you desire to answer any questions without a lawyer, you may do so, but you may stop at any time you should desire.

The defendant indicated that he understood the statements and signed the card in the space provided. The defendant then orally gave an inculpatory statement which was not recorded and which was completed at 3:10 p.m. Clingenpeel, who testified at an April 1978 suppression hearing, stated that he immediately returned to his office and reduced his recollection of the defendant's confession to writing. The defendant did not thereafter examine or sign the officer's memorandum.

At the suppression hearing, Clingenpeel stated that, at the time of the interview, he did not know whether the defendant had been arraigned, or whether counsel had been appointed. He testified that he made no attempt to ascertain if counsel had been, in fact, appointed and, of course, did not try to notify counsel of the interview. The defendant was first informed of the identity of his court-appointed counsel on December 14 and first saw the attorney on that day. The record does not reveal when counsel learned of the appointment.

The defendant asserts that the trial court erred in refusing to suppress his confession because the police did not allow him sufficient time to confer with his court-appointed counsel before they initiated a custodial interview, citing United States v. Clark, 499 F.2d 802 (4th Cir. 1974). He maintains that our prior decisions in Lamb v. Commonwealth, 217 Va. 307, 227 S.E.2d 737 (1976), and in Skinner v. Commonwealth, 212 Va. 260, 183 S.E.2d 725 (1971), are not controlling. He urges that, unlike the defendant in Lamb, he did not surrender voluntarily on the advice of counsel and unlike the defendants in Lamb and Skinner he did not initiate the interview after having had the opportunity to confer with his attorney. We disagree with defendant's argument.

We have adopted the rule that "the police may question an accused who has counsel, retained or appointed, whether or not the attorney is present, if there is an affirmative waiver by the accused of his right to counsel made voluntarily, knowingly and intelligently." Lamb v. Commonwealth, 217 Va. at 310, 227 S.E.2d at 740. Such a waiver may occur either before or after counsel is retained or appointed. See Skinner v. Commonwealth, 212 Va. at 263, 183 S.E.2d at 728. And a defendant may waive his right to counsel after he has previously asserted the right, as long as the defendant's prerogative to exercise the right is "scrupulously honored", Michigan v. Mosley, 423 U.S. 96 (1975); Miranda v. Arizona, 384 U.S. at 474-75; State v. Steelman, 585 P.2d 1213, 1221-22 (Ariz. 1978); State v. Stone, 397 A.2d 989, 995 (Me. 1979), although the courts indulge every reasonable presumption against waiver and a heavy burden rests on the Commonwealth to demonstrate that the defendant knowingly, intelligently and voluntarily waived his right to counsel. Brewer v. Williams, 430 U.S. 387, 404 (1977); Lamb v. Commonwealth, 217 Va. at 310-11, 227 S.E.2d at 740.

We believe Lamb and Skinner control here. We will even assume, but not decide, that defendant is correct in that part of

his argument in which he maintains that a request for the appointment of an attorney at arraignment constitutes an exercise of the right to counsel requiring the cessation of police interrogation under Miranda. Nevertheless, we think that the defendant here subsequently knowingly, intelligently and voluntarily waived his right to counsel.

The defendant was initially interviewed on the day of his arrest, the day before his arraignment. While the testimony indicates that he "said very few words", the record shows that defendant was advised of his rights on that day and affirmatively waived his right to counsel and his right to remain silent during that interview. On the next day, five hours after his arraignment, when the police sought to interview defendant, the interviewing officer, without knowing whether defendant had been arraigned, informed him of his rights orally and in writing at the commencement of the interrogation. The defendant then affirmatively waived his right to counsel by signing the "rights card" beside the statement "SIGN IF YOU WAIVE THESE RIGHTS". He then willingly discussed the case without ever asking to see counsel at any time during the course of the interview.

United States v. Clark, 499 F.2d 802 (4th Cir. 1974), relied upon by the defendant, is distinguishable. There, the defendant's request for appointed counsel on grounds of indigency was denied at the bond hearing. After the hearing, government agents attempted to interview the defendant, but he stated that he wanted to consult with an attorney. The interview was terminated; however, three-and-one-half hours later, the agents again initiated interrogation of the defendant and attempted to persuade him to answer questions. Clark ultimately waived his right to counsel orally and gave an inculpatory statement. In holding that the waiver was involuntary, the Court of Appeals emphasized the fact that the defendant had previously requested counsel, that the police initiated the second

interrogation and that the police used persuasion to convince the defendant to waive his right to counsel. Id. at 807.

In Clark, the defendant's assertion of his right to counsel occurred in an interrogation context after defendant's request for appointed counsel had been refused. Here, the defendant never asserted his right to counsel during interrogation. The record does not reveal any attempt to persuade the defendant to waive his right to counsel; rather, the defendant signed the waiver card when he was first asked. And while in Clark, as here, the police initiated the interrogation, there is no evidence that the police conduct was coercive in this case. Thus, we think the trial court was correct in admitting the confession in evidence.

For the error in the form of the instructions as compounded by the improper closing argument of the prosecutors, we will reverse the judgment convicting defendant both of capital murder and of use of a firearm during the commission of a felony.

The Attorney General at the bar suggested that, in the event of a reversal, the remand should be for the sole purpose of sentencing defendant for first degree murder because, under the jury's finding, defendant is guilty of either capital murder or murder in the first degree. But the error of which we have spoken has not affected only those two grades of the homicide and the quantum of punishment; it has permeated the entire guilt and punishment determination at all stages. So, under these circumstances, we may not properly select one grade of the homicide to furnish the basis for resentencing only.

Consequently, for all of these reasons, the charges of capital murder and of using a firearm during the commission of a felony will be remanded for a new trial on all issues.

Reversed and remanded.

by the page number. References to a transcript of the first trial will be denoted by "TA," followed by the page number. References to the record subsequent to remand will be denoted by "R," followed by the page number, and references to the record of proceedings prior to remand will be denoted by "RA," followed by the page number.

ASSIGNMENTS OF ERROR

I. The defendant's prosecution for capital murder in the commission of armed robbery was barred by the doctrines of collateral estoppel, double jeopardy and autrefois acquit, inasmuch as a jury previously had acquitted the defendant of robbery in the same incident. The trial court erred in permitting prosecution upon the indictment for capital murder, and entering judgment thereon.

II. The trial court erred in failing to suppress the defendant's confession, when the defendant had unequivocally requested the services of an attorney, had initiated neither the contact with the police nor the specific interrogation session, and did not have the opportunity to confer with the attorney prior to interrogation.

III. The evidence was insufficient to sustain a conviction for capital murder.

QUESTIONS PRESENTED

The questions presented are numbered to correspond with the assignments of error to which they refer.

I. WHETHER THE DEFENDANT'S PROSECUTION FOR CAPITAL MURDER IN THE COMMISSION OF ARMED ROBBERY WAS BARRED BY THE DOCTRINES OF COLLATERAL ESTOPPEL, DOUBLE JEOPARDY AND AUTREFOIS AC-

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday *the* 15th *day of* July, 1980.

Major Henry Johnson, Jr., Appellant,

against Record No. 800372
Circuit Court No. F-50691

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Alexandria

Upon the petition of Major Henry Johnson, Jr., an appeal is awarded him from a judgment rendered by the Circuit Court of the City of Alexandria on the 7th day of November, 1979, in prosecutions by the Commonwealth against the said petitioner for felonies.

This appeal, however, is limited to the consideration of assignment of error No. I which reads as follows:

I. The defendant's prosecution for capital murder in the commission of armed robbery was barred by the doctrines of collateral estoppel, double jeopardy and autrefois acquit, inasmuch as a jury previously had acquitted the defendant of robbery in the same incident. The trial court erred in permitting prosecution upon the indictment for capital murder, and entering judgment thereon.

On further consideration whereof, it is ordered that the parts of the record to be printed or reproduced in the appendix are to be limited to those parts of the record germane to assignment of error No. I, and the briefs to be filed shall be limited to such discussion as is relevant to the assignment of error upon which this appeal is awarded.

The petition for appeal is refused as to the remaining assignments of error.

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Teste:

Clerk

A COPY TESTE:
Edward Semonian, Clerk
By: R. D. Burland, Deputy Clerk

Present: All the Justices

MAJOR HENRY JOHNSON, JR.

-v- Record No. 800372 OPINION BY JUSTICE ALBERTIS S. HARRISON, JR.
January 16, 1981

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF THE CITY OF ALEXANDRIA
Kenneth E. Trabue, Judge

This case is the sequel to Johnson v. Commonwealth, 220 Va. 146, 255 S.E.2d 525 (1979). A judgment was entered by the court below in accordance with a jury's verdict, finding Major Henry Johnson, Jr., guilty of capital murder in violation of Code §18.2-31(d), and sentencing him to life imprisonment. The appeal is limited to a consideration of defendant's claim that his prosecution for capital murder in the commission of armed robbery was barred by the doctrines of collateral estoppel, double jeopardy, and autrefois acquit for the reason that a jury in the Circuit Court of Roanoke had previously acquitted him of robbery growing out of the same incident.

Johnson was originally tried in Roanoke under a three-count indictment charging him (1) with the robbery of John N. Gardner of United States currency, (2) with the felonious killing and murdering of John N. Gardner while committing robbery while armed with a deadly weapon, and (3) with using a pistol while committing murder. At the conclusion of the evidence, the trial court, without objection and at the request of the defendant, granted an instruction which stated that "if, under Count II [capital murder] of the indictment, you find the defendant guilty of capital murder, then you must find him not guilty under Count I [robbery] of the indictment." The court, without objection, also granted an instruction which in pertinent part told the jury that "if you find the defendant guilty of capital murder, then you must find the defendant not guilty of robbery, inasmuch as

the elements of robbery are integral parts of the elements of the offense of capital murder in this case." The jury was told that capital murder is the "wilful, deliberate and premeditated killing of any person while in the commission of robbery while armed with a deadly weapon" and further that the jury must find beyond a reasonable doubt that "at the time of any such killing the defendant was committing robbery while armed with a deadly weapon" in order to convict for capital murder.

The record of defendant's first trial discloses that the jury initially returned a verdict finding Johnson guilty of capital murder under Count II of the indictment. The court thereupon instructed the jury to return to the jury room for a further consideration of Counts I and III. Thereafter the jury returned its verdicts finding the defendant guilty of capital murder, guilty of using a pistol in the commission of murder, and not guilty of robbery. The trial being bifurcated, the jury then considered the issue of punishment and returned its unanimous verdict fixing defendant's punishment at death. The verdict was subsequently approved and affirmed by the trial court. The order of the trial court recites that "[i]n view of the fact that robbery is an integral part of Capital Murder, it is Ordered that Robbery, Count 1 ... be dismissed." The defendant voiced no objection to the form of the orders entered by the court.

The defendant appealed his capital murder conviction, seeking a new trial. At that time he raised no issues of double jeopardy, collateral estoppel, autrefois acquit, or inconsistent verdicts The defendant's conviction for capital murder was reversed and the case remanded for retrial because of error in the form of the instructions as compounded by improper argument of the prosecutors. The jury was not instructed that to convict the defendant of capital murder, it must have found that he was "the triggerman." Following a remand of the case, and on motion of the defendant, a

change of venue was granted to the Circuit Court of the City of Alexandria.

Prior to his second trial, the defendant sought to have the trial court dismiss or reform the capital murder indictment, alleging grounds of double jeopardy, collateral estoppel, and autrefois acquit. Specifically, defendant contended there, and argues on this appeal, that since he was "acquitted" of robbery at the first trial he could not be tried for capital murder because the elements of an armed robbery are integral to a conviction of murder in the commission of armed robbery. The trial court overruled defendant's motion, and upon a retrial the jury convicted the defendant of capital murder. Because the jury was unable to agree on the imposition of the death penalty, the defendant was sentenced by the trial court to life imprisonment. Code §19.2-264.4(E).

The facts of the case are set forth in our opinion in Johnson v. Commonwealth, supra. It suffices to say that on December 9, 1977, John Gardner of Roanoke was shot and killed. At the same time money and property were taken from Gardner's person and office The defendant and his brother David A. Johnson were the perpetrators of this crime. The verdicts finding defendant guilty of capital murder are amply supported by the evidence. There were no eyewitnesses to the murder and robbery other than the two Johnson brothers. The prosecution of thecase was not without difficulty and to meet the exigencies of proof the Commonwealth's Attorney framed one three-count indictment charging the defendant with capital murder, robbery, and the use of a pistol while committing murder.

Virginia Code §18.2-31 provides, in pertinent part, as follows:

> The following offenses shall constitute capital murder, punishable as a Class 1 felony:
>
> * * *

(d) The willful, deliberate and premeditated killing of any person in the commission of robbery while armed with a deadly weapon; ...

Therefore, to convict of capital murder under subdivision (d) of Code §18.1-31, the Commonwealth must establish all the elements necessary to convict of first degree murder, i.e., that the killing was willful, deliberate and premeditated and, in addition, all the elements necessary to convict of an armed robbery.

The origin, history, and purpose of the double jeopardy clause of the Fifth Amendment are hardly a matter of dispute. In the recent case of Turner v. Commonwealth, ___ Va. ___, ___ S.E.2d ___ (1980), we enumerated the three separate guarantees assured by the constitutional prohibition of double jeopardy to be the protection against a second prosecution for the same offense after acquittal or after conviction and the protection against multiple punishments for the same offense. We referred to Blockburger v. United States, 284 U.S. 299, 304 (1932), where it was said that "the test to be applied to determine whether there are two offenses or only one, is whether each [statutory] provision requires proof of a fact which the other does not." See also Harrison v. Commonwealth, 220 Va. 188, 257 S.E.2d 777 (1979); Roderick Cecil Jones v. Commonwealth, 218 Va. 757, 240 S.E.2d 658, cert. denied, 435 U.S. 909 (1978).

We are conscious of our holding in Jones, supra, that the double jeopardy clauses of the federal Constitution and of the Virginia Constitution "forbid not only subsequent punishment but subsequent prosecution. [Citation omitted.] Those clauses apply not only when the two offenses are identical, but also when the former offense is lesser-included in the subsequent offense. [Citations omitted.] The guarantees also apply when the subsequent offense is lesser-included in the former offense."[Citations

omitted.] 218 Va. at 759, 240 S.E.2d at 660.

The defendant argues that at his first trial he could not, due to double jeopardy protections, have been convicted of both capital murder and robbery. The answer to this argument is that had defendant been found guilty of both capital murder and robbery in the first trial, the issue of "same offense" would not arise because the convictions arose from a single criminal trial. However, if defendant, after being convicted of both crimes, had been subjected to punishment for both, an issue of double jeopardy with regard to multiple punishments would arise. Turner, ___ Va. at ___, ___ S.E.2d at ___.

Defendant also claims that robbery is a lesser-included offense of capital murder and that since every element necessary to establish the corpus delicti of robbery is relevant and essential to the proof of capital murder, the reciprocal nature of the double jeopardy clause prohibits his conviction of capital murder based on robbery when the defendant had previously been acquitted of that robbery.

Significantly, counsel for defendant concedes that the jury may in fact have acquitted, not on merit but because it was so instructed by the court. The defendant nevertheless contends that on the robbery count he has been discharged "without day" and that his subsequent prosecution for any offense which includes the elements of robbery is barred.

There is not the slightest confusion or doubt about what occurred at Johnson's first trial before the Circuit Court of Roanoke. He was indicted on a single indictment which contained three counts, a matter within the discretion of the prosecution. The Commonwealth's Attorney had no way of knowing in advance how the testimony would evolve and whether one or both of the Johnson

brothers would be proven to be the robber and the murderer. The defendant was never in any jeopardy of being convicted by the Roanoke jury of both capital murder and robbery and punished for both offenses. This fact was recognized by the defendant, the Commonwealth's Attorney, and the trial court. The jury was specifically instructed that it could not find the defendant guilty of both capital murder and robbery. The jury was also instructed that for it to convict Johnson of capital murder, it had to find that his killing of the victim was not only willful, deliberate, and premeditated but occurred during the course of defendant's armed robbery of the victim.

While the trial court properly may have followed some other course of action in the first trial, we find no prejudice to the defendant in the course it did follow. This court would stultify itself to hold that the jury in this case made a factual finding that Johnson was innocent of robbery. We would have to find that it ignored the court's instruction and that its finding of not guilty under Count I was completely unrelated to the express direction it had received from the court to return such a verdict if it found defendant guilty of capital murder.

The dispositive issue is whether for double jeopardy purposes there has ever been a factual acquittal of the defendant on the robbery charge. The defendant asked for the instruction which prompted the jury's verdict on the robbery count. He therefore, aided by the Commonwealth's Attorney and the trial judge, successfully obtained a termination of his prosecution on the robbery count without any determination of his factual guilt or innocence under this count. On the contrary, the jury was directed to return the verdict it did because it, in fact, had found that defendant was guilty of committing an armed robbery (during which

he also committed murder). Or, stating this anomalous situation differently, the "not guilty" verdict solicited by the defendant and the prosecution, and directed by the court, was predicated upon an affirmative factual finding by the jury that the defendant was guilty of robbery. Surely the double jeopardy clause, designed to protect against government oppression, does not apply under such circumstances. The Supreme Court recently noted, in United States v. DiFrancesco, ___ U.S. ___ (1980), that the double jeopardy provision is designed to serve "as a bar against repeated attempts to convict, with consequent subjection of the defendant to embarrassment, expense, anxiety, and insecurity, and to the possibility that he may be found guilty even though innocent." None of these considerations are applicable in the instant case.

The defense relies strongly upon Adkins v. Commonwealth, 175 Va. 590, 9 S.E.2d 349 (1940), and Simon v. Commonwealth, 220 Va. 412, 258 S.E.2d 567 (1979). Adkins was charged in one count of an indictment with bigamy and in the other count with aiding and abetting in the commission of bigamy. Upon arraignment he demurred to both counts on the ground that being an unmarried man he could not be guilty. The court sustained the demurrer as to each count and ordered that the defendant be discharged from the indictment and go thereof "without day." Adkins was again indicted and charged with the aiding and abetting of bigamy. This court held that the trial judge should have sustained the defendant's plea of autrefois acquit, noting that the court had previously sustained a demurrer to the first indictment "to each count thereof" on the ground relied upon by the accused. Adkins had therefore been fully discharged on both counts by a ruling which as a matter of law barred further proceedings.

In Simon v. Commonwealth, supra, a defendant was acquitted in the district court on a charge of driving a motor vehicle while

under the influence of intoxicants. Subsequently the defendant was indicted for involuntary manslaughter, and during his trial the Commonwealth presented evidence on the issue of defendant's intoxication, an issue which had been previously decided in his favor in the prior proceeding in the district court. Consistent with Ashe v. Swenson, 397 U.S. 436, 442-43 (1970), we said that "the Commonwealth is barred from introducing evidence to prove an offense for which a defendant has been previously acquitted, even though the facts necessarily resolved in the acquittal are not dispositive of an element of the offense charged in the second trial." Id. at 417, 258 S.E.2d at 571. We took occasion to note that Ashe "seems to focus upon the relitigation of issues of ultimate fact," and that "[c]ourts are in general agreement that in order to bar a subsequent prosecution for a different offense arising out of the same transaction a necessary element of the offense in the second trial must have been clearly adjudicated in the earlier proceeding." Id. at 415, 417, 258 S.E.2d at 570, 571. We held that collateral estoppel bars a state's relitigation of facts which had been decided in the defendant's favor in the prior trial even though the second prosecution is not barred. However, we added that "[t]o understand the limits of our holding it is necessary to scrutinize the exact meaning of the district court's determination that defendant was not guilty of driving under the influence of intoxicants." Id. at 419, 258 S.E.2d at 572.

The court in Adkins decided that the defendant, being unmarried, could be guilty of neither bigamy nor aiding and abetting in the commission of bigamy. Therefore his discharge constituted a true acquittal upon a defense which barred his reprosecution. In Simon there had been an acquittal of the defendant because of the prosecution's inability to establish intoxication. There had

been an actual adjudication in favor of Simon of a factual nature and of an element pertinent to the offense involved in his second trial.

Dismissals of indictments are granted for a number of reasons and often serve as tools for the exercise by a trial court of its discretion. United States v. Scott, 437 U.S. 82 (1978),* recognizes that double jeopardy following dismissal depends on subtle distinctions in the reasons underlying a judgment. It appears that the Court in Scott approved a new definition of the acquittal required to invoke a double jeopardy defense. The Court held that a defendant is acquitted for double jeopardy purposes where the ruling of the trial judge represents a resolution in the defendant's favor, correct or not, of some or all of the factual elements of the offenses charged. This permits a court to distinguish between a dismissal granted pursuant to a legal defense and a dismissal granted pursuant to a factual defense. The latter would qualify as an acquittal for double jeopardy purposes. A legal dismissal might not because its effect could result in a termination of the proceedings against the defendant on a basis unrelated to factual guilt or innocence. This rationale applies in the instant case. Here, the directed "not guilty" verdict depended legally upon a finding of factual guilt rather than factual innocence. The legal principle was activated when the jury found beyond a reasonable doubt that all the elements necessary to convict of first degree murder and of robbery had been established and therefore the commission of capital murder was proved. It was this finding by

*In United States v. Scott, the trial court, at the conclusion of evidence and on defendant's prior motion, dismissed two counts of a three-count indictment charging distribution of various narcotics because of prejudice from preindictment delay, and the jury thereafter returned a verdict of not guilty as to count three. The Supreme Court, speaking through Mr. Justice Rehnquist, held that the Government was not precluded from appealing an order dismissing the first two counts on the ground that an appeal would offend the double jeopardy clause of the Constitution.

the jury that triggered its "not guilty" verdict which formed the basis of defendant's plea and of this appeal.

It is our conclusion that defendant has not been dismissed "without day," that there has been no prior factual determination in favor of defendant with regard to robbery, and that defendant was not previously "acquitted" of robbery.

Accordingly, the judgment of the court below is affirmed.

Affirmed.